Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

April 1 through June 30, 2005

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Production Summary

- The active inventory totalled 5,360 (34% over the target of 4,000 cases).

- Incoming appeals numbered 1,203; of these, 1021 were appeals from WSIB decisions and 182 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 971 new appeals and 153 reactivated appeals recorded in the first quarter of 2005.
  - In 2004, the weekly average of hearing ready appellants was 74. For Q2 2005, the weekly average of hearing ready appellants is 66. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1,048; this includes 417 dispositions in the pre-hearing areas resulting from dispute resolution efforts and 631 after hearing dispositions; of the after hearing dispositions, 599 followed from Tribunal decisions.

- The inactive inventory increased by 52 cases to 4,239 (at the end of Q1-05, inactive inventory was 4187 cases).

- 80% of final decisions were released within 120 days.

- Due to a lack of adjudicative resources, the Appeals Tribunal is currently unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form. This also led to delays in the pre-hearing areas.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the second quarter of 2005, the notice inventory included 1,506 dormant cases, the active inventory totaled 5,360 cases, and the inactive inventory totaled 4,239 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q2-2004	5101
Q3-2004	5149
Q4-2004	5192
Q1-2005	5160
Q2-2005	5360

B. Incoming Appeals

Period	Incoming Appeals
Q2-2004	1157
Q3-2004	1055
Q4-2004	1126
Q1-2005	1124
Q2-2005	1203

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q2-2004	1139	514	623
Q3-2004	982	425	557
Q4-2004	1120	473	647
Q1-2005	1136	456	680
Q2-2005	1048	417	631

D. Inactive Inventory

Period	Inactive Inventory
Q2-2004	4195
Q3-2004	4193
Q4-2004	4139
Q1-2005	4187
Q2-2005	4239

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q2-2004	1543	-276
Q3-2004	1568	25
Q4-2004	1531	-37
Q1-2005	1551	20
Q2-2005	1506	-45

The Tribunal inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management.

Communications

In May 2005, Business Unit managers from the WSIB and Tribunal staff met to continue discussions as the Quality Loop – Decision Implementation Group.

In June 2005, Board staff from the Appeals Branch, Legal Department and Records area and Tribunal staff comprising the Quality Loop, met to discuss various administrative issues of note during the period.

Tribunal staff attended and presented at CCAT (Council of Canadian Administrative Tribunals) Conference in June 2005.

Judicial Review Activity

As noted in the first quarter report, in April the Court of Appeal allowed the Tribunal's appeal of a Divisional Court decision, which had quashed a decision of the Tribunal. This appeal had particular significance. In its almost twenty years of existence, the Tribunal had never before had one its decisions quashed on judicial review. As set out under item #1 below, the Court of Appeal allowed the Tribunal's appeal, set aside the decision of the Divisional Court, and reinstated the decision of the Tribunal. During this quarter the worker filed an application for leave to appeal to the Supreme Court of Canada.

The status of applications for judicial review involving the Tribunal for the second quarter of 2005 are set out below. Only those judicial reviews where there was activity during the quarter are listed below. There are a number of other pending judicial reviews in which there was no action during this particular quarter.

1. Decisions Nos. 770/98I (October 27, 1999) and 770/98IR (February 5, 2002)

The Court of Appeal granted leave to appeal the only Divisional Court decision which had ever quashed a Tribunal decision on judicial review. The Court of Appeal heard the appeal on March 15, 2005. The Panel of MacPherson, Cronk and Whalen released its decision on April 7, unanimously granting the Tribunal's appeal.

This case involves a worker who was granted chronic pain entitlement by the Board, but was awarded no future economic loss. She appealed this to the Tribunal, alleging she did not have chronic pain, but instead had an organic condition known as traumatic vertebrobasilar ischemia (TVBI). The Tribunal dismissed the appeal, and confirmed the worker had chronic pain. In coming to this finding, the Panel concluded the worker had hit her head once at the time of her accident.

The worker then requested the Tribunal reconsider the finding in *Decision 770/98I* that she had a non-organic condition. She also argued in the alternative, as a new issue, that she had a somatoform disorder. In support of her reconsideration the worker submitted an affidavit from a co-worker. The affidavit said the co-worker could now recall that in 1991 the worker had struck her head twice at the time of the accident. In *Decision 770/98IR*, the Panel denied the reconsideration, and confirmed the worker did not have TVBI. However, the Panel found that the worker had a somatoform disorder, rather than chronic pain.

The worker applied for judicial review of the decision that she did not have an organic condition.

The judicial review was heard in Divisional Court on April 19, 2004. The Court found the Tribunal's decision was patently unreasonable. The Divisional Court's decision,

which is not long, focused on two paragraphs of the reconsideration decision. The Court was not satisfied about the way the Panel had dealt with the co-worker's affidavit on the reconsideration in regards to the number of times the worker had struck her head. The Divisional Court decision also stated that the Tribunal had not satisfactorily dealt with the conflict in the medical evidence.

At the Court of Appeal the Tribunal took the position that the Divisional Court had failed to appreciate the Tribunal's decision was written the way it was because it was a reconsideration of its first decision. The test on a reconsideration is whether there was good reason to believe there was a significant defect in the decision that would change the result of the original decision. Further, the Tribunal argued the reasons provided by the Panel in rejecting the affidavit were more than adequate, and the decision was certainly not patently unreasonable.

The Court of Appeal granted the Tribunal's appeal. MacPherson J., writing for the Court, reaffirmed the standard of review was patent unreasonableness. He stated that the Divisional Court had erred in its conclusion that the Tribunal decision should be quashed. Contrary to the findings of the Divisional Court, the Court of Appeal found the Tribunal's decision had focused on the correct issue; that it had sufficiently explained the rejection of the affidavit evidence; and the Tribunal had dealt extensively with all the medical evidence and had explicitly resolved the conflicting opinions of the physicians.

The Court of Appeal stated:

> "The Tribunal carefully considered all the evidence and reached, and explained, its decision. In short, the Tribunal did precisely what it was supposed to do."

The Court of Appeal set aside the decision of the Divisional Court and reinstated the final decision of the Tribunal.

On June 6, 2005 the Applicant filed an application for leave to appeal to the Supreme Court of Canada.

2. Decision No. 1384/03 (December 30, 2003)

The worker and her sister were suspended for smoking at work. The sister reported an accident later that day, before the suspension took effect. The worker reported a sudden accident within two hours of returning after her suspension. Alternatively, the worker claimed she had suffered an accident by disablement as a result of the repetitive nature of her work. The Panel reviewed the medical evidence and the testimony of the witnesses and denied initial entitlement to the worker. The Tribunal did not find the worker to be credible. Both the worker and her sister commenced separate applications for judicial review.

The judicial review for this worker was heard by the Divisional Court Panel of Justices Lane, Jennings and Swinton on April 6, 2005. The Divisional Court unanimously dismissed the Application for judicial review, stating

> "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

3. Decision No. 1509/02 (February 2, 2004)

This judicial review was received at the same time as the one for *Decision No. 1384/03* (above). As noted above, the two workers are sisters, both were suspended at the same time, and both claimed to have compensable accidents. Both are represented by the same law firm. In this decision the Panel allowed the employer's appeal and denied the worker entitlement for the alleged accident.

Following the dismissal of the sister's judicial review in *Decision No. 1384/03*, on April 6, 2005, counsel for this worker filed a factum. At the end of this quarter the Tribunal was preparing its factum. The employer is not participating in the judicial review.

4. Decisions Nos.1584/02 (July 15, 2003) and 1584/02R (June 16, 2004)

The worker, a car salesman, had a congenital lesion in his brain which was asymptomatic until 1993. In 1991 he suffered an injury when the rear door on a van was accidentally shut on his head. The worker did not seek any medical attention for this injury. Eighteen months later the worker had a seizure, and alleged it was caused by head injury. The Panel denied the worker's appeal, finding there was no entitlement for the seizures.

The worker has brought an application for judicial review. The Tribunal filed its factum in January 2005. It is anticipated that this judicial review will be heard in November of 2005.

5. Decision No. 117/04 (September 27, 2004)

This right to sue application found a courier was a worker, rather than an independent operator, and that his right of action was therefore taken away. Counsel for the worker has commenced an application for judicial review.

During this quarter the Tribunal prepared and filed its factum. The Divisional Court in London has advised the judicial review will be heard in November.

6. Decision No. 653/99 (November 15, 1999) and 653/99R (January 21, 2002)

The Tribunal denied the worker's appeal for an increased future economic loss and non-economic loss, on the grounds that the worker's medical condition was caused by non-compensable factors. The worker delayed more than three years before bringing the application for judicial review. There are problems with the worker's materials, and at the end of the quarter the Tribunal was waiting for the Applicant to revise and re-serve their materials.

Highlights of Released Decisions

Respiratory condition- Histoplasmosis

Decision No. 1951/03 considered the worker's claim for ongoing benefits for his airway hyper responsiveness condition, which he related to his compensable histoplasmosis condition. Histoplasmosis is a respiratory disease with symptoms similar to influenza, which can develop into fever, anemia and skin lesions. The worker developed this condition as a result of coming into contact with bats and bat droppings while working in a mine in April 1993. The Ontario Board accepted the worker's claim for histoplasmosis and awarded temporary benefits from April to September 1993. The worker then worked in a mine in the Northwest Territories (NWT) in June 1994 where he started to experience symptoms of his airway-hyper-responsiveness condition while mining underground. The worker filed a claim for benefits with the NWT Board, which was denied. The worker then filed a claim with the Ontario Board for his airway hyper-responsiveness condition as a sequel to his histoplasmosis condition. The decision applied the reasoning in **Decision No. 1386/03.** In that case the worker was allowed benefits for his Hepatitis C condition as arising from his employment in a nursing home. In that case, evidence from a medical assessor opined that the worker most likely contacted Hepatitis C in his work environment where there was a higher incidence of Hepatitis B than in the general population. Also, there was no evidence that the worker's father was infected and thereby infected the worker with Hepatitis C. **Decision No. 1951/03** found that among the multiple theories of how the worker's airway hyper-responsiveness developed there was only one non-compensable theory (i.e. Relating the worker's symptoms to his exposure in the mine in NWT). This theory however was highly unlikely given that prior to 1993, the year the worker developed histoplasmosis, the worker never experienced any such symptoms while working in similar environments.

Time Limits

Decision No. 1411/01 contains an interesting discussion comparing the time limits to file a claim under both the pre-1997 Act and *WSIA*. The Vice Chair noted the Board's Guidelines for Late Filing (May 2003), which provide for circumstances in which the Board is to exercise discretion and allow for late filing. These circumstances include: compelling personal reasons; the worker's inability to understand time limits; and

whether the worker had reported the accident to a co-worker, employer or health professional. The decision noted that s 22(1) and (3) WSIA places a greater onus on a worker to comply with the time limits to file a claim than does the pre-1997 Act. While section 22 of the pre-1997 Act also requires that a claim be filed within 6 months of the accident, section 22(5) of the pre-1997 Act specifically provides that a late filing does not bar entitlement unless the delay has prejudiced the accident employer or where the claim is a just one and ought to be allowed. Section 22 of the pre-1997 Act therefore provided greater latitude with respect to compliance with the 6 month time limit. The time limit extension was allowed in this case as the pre-1997 Act applied given the 1995 accident date. The decision commented that if the claim had been adjudicated under WSIA, the time extension would not have been allowed as the worker did not credibly or sufficiently explain his delay in filing this appeal.

Decision No. 2199/04 addressed the application of section 120(1)(a) WSIA, which provides for a 30 day time limit in which a party may appeal a decision respecting a return to work or labour market re-entry plan. The decision interpreted "labour market re-entry plan" referred to in the section as entailing not only determining the SEB but also the production of the plan containing the steps to enable the worker to get employment in the SEB. A worker would not be able to evaluate the adequacy of an LMR plan identifying the SEB without complete information with respect to "deemed earnings" of that SEB. The 30 day time limit then should not start until all decisions regarding the SEB have been made, including the deemed earnings of the SEB and the quantum of LOE benefits. The decision therefore found that the worker was entitled to a time extension, on the basis that the time limit should have run from the date of the decision in which the worker was informed of the "deemed earnings" of the SEB designated for him, rather than the earlier decision which merely informed the worker of this SEB. The time extension was also allowed on the basis that the "in time" appeal respecting LOE benefits was so inextricably linked with the issues in the June 2002 decision that the time extension should be allowed.

Earnings Basis

Decision No. 1390/04 addressed the question of calculating long-term earnings for workers employed by personnel agencies. OPM Document # 18-02-04 respecting the calculation of long-term average earnings for workers in non-permanent and irregular employment was found to be the applicable policy for such workers. Under this policy, for the purposes of calculating average earnings, a recalculation period has to be established. The recalculation period for workers in non-permanent employment is generally based on employment in the 24 months prior to the work-related injury. To simplify the calculation, the policy provides that the 24-month period may be extended to include the two full calendar years before the injury, plus the current year up to the date of injury, or shortened to the full calendar year before the injury, plus the current year up to the date of the injury, provided that the worker's employment pattern is accurately reflected. The policy further states that, if the decision-maker extends/shortens the recalculation period, the decision-maker may have regard to the

worker's seasonal or cyclical work pattern. Periods of unemployment due to lay-offs, terminations, seasonal employment or unavailability of work are included in the recalculation along with any EI benefits received. Periods of non-earning that are not part of the employment pattern are not included in the recalculation period. These periods may include parental/maternity leaves and periods of full-time schooling. The decision upheld the Board's calculation of the worker's long term earnings, which eliminated a period when the worker was not working as she was in school and having a baby and did not consider a move she made to another city where she started working for the personnel agency, as a break in her employment that would affect the recalculation period.

July 2005